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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

LITTLER, MENDELSON,
FASTIFF & TICHY
GEORGE J. TICHY, II, ESQ.
ROY D. AXELROD, ESQ.
JAMES J. McMULLEN, JR., ESQ.
[COUNSEL OF RECORD]
JACQUELINE P. McMANUS, ESQ.
701 "B" Street, Suite 300
San Diego, CA 92101-8102
Telephone: (619) 232-0441
and
LLOYD A. SCHWARTZ, ESQ.
GENERAL COUNSEL
SOUTHWEST MARINE, INC.
P.O. Box 13308
San Diego, CA 92170-0308
Telephone: (619) 238-1000
Attorneys for
Southwest Marine, Inc.

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

LIST OF PARTIES

The following are the parties to this proceeding:

Byron Gizoni
Plaintiff-Respondent

Southwest Marine, Inc.
Defendant-Petitioner

Preston Easley, Esq.
San Pedro, California
Attorney for Plaintiff-Respondent

George J. Tichy, II, Esq.
Roy D. Axelrod, Esq.
James J. McMullen, Jr., Esq.
[Counsel of Record]
Jacqueline P. McManus, Esq.
Littler, Mendelson, Fastiff & Tichy
San Diego, California
Attorneys for Defendant-Petitioner

Lloyd A. Schwartz, Esq.
General Counsel
Southwest Marine, Inc.
San Diego, California
Attorneys for Defendant-Petitioner

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ARGUMENT

I

THE ARGUMENTS OF RESPONDENT AND ITS *AMICI* IGNORE THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS.

The Ninth Circuit *Gizoni* decision that a ship repairman, who works on floats and platforms to repair various vessels in a shipyard, is entitled to proceed to a jury trial on a Jones Act seaman claim is inconsistent with the congressional intent behind the LHWCA and its amendments. Respondent and its *amici* would

prefer to ignore that congressional intent. Rather, Respondent and its *amici* repeatedly argue that the determination of Gizoni's status as a "seaman" is for the jury to decide.[1]

However, Respondent and its *amici* have simply failed to negate the unequivocal congressional mandate behind the LHWCA and its amendments to provide a uniform, no-fault compensation system to land-based maritime employees on the waterfront, without the expense, uncertainty, and delay that tort actions, such as Jones Act claims, entail. They have also failed to negate the congressional intent for the LHWCA to cover at least those employees, such as Gizoni, who are employed by a statutory employer on a covered situs in an occupation enumerated in the LHWCA.

The United Brotherhood of Carpenters and Joiners of America ("UBCJA") *Amicus*[2] argues that the Court should allow the Jones Act seaman status issue to "percolate" in the lower courts.[3] Or perhaps stated in a more candid fashion, to continue

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1 Respondent's citation to a section of the "Longshore Desk Book" published by the U.S. Department of Labor does not support his position, see Respondent's Brief, at pp. 17, 18, and is inappropriate. See November 24, 1986 Notice of then Chief Administrative Law Judge Robert Ramsey that the "Longshore Desk Book" "is not intended as final legal authority and should not be cited or relied upon as such." Vol. A, Benefits Review Board Service ("BRBS"), Section 6, page 6-iii.

2 Petitioner had stipulated with Respondent for the filing of two *amicus* briefs per side after being contacted by Mr. Hillsman and Mr. Easley, both of whom had initially advised that Mr. Hillsman would be filing an *amicus* brief on behalf of the American Trial Lawyers Assn./California Trial Lawyers Assn.

3 *Amicus* Brief of UBCJA, at p. 9.

to be litigated in the lower courts. However, allowing that issue to continue to be litigated in the lower courts may perhaps benefit some attorneys, but it would not benefit maritime employers and employees alike.

Perhaps most surprising, and indeed inexplicable, is the position of the United States. That may be due in part to the initial misunderstanding by the United States of the question presented herein for review. Contrary to that stated on page one of the *Amicus* brief for the United States, the present issue before the Court is *not* whether a maritime employee whose occupation is one of those enumerated in the Longshore Act may be a seaman within the meaning of the Jones Act.[4] That issue was resolved by the Court in *McDermott International, Inc. v. Wilander*.[5] In *Wilander*, the Court made clear that the LHWCA and Jones Act are "mutually exclusive; a 'seaman' under the Jones Act is excluded from the LHWCA as a 'member of a crew of a vessel' . . . ." It follows that a maritime employee whose occupation is one of those enumerated in the Longshore Act may not be a Jones Act seaman.

More troubling, however, is the position of the United States that a ship repairman employed by a shipyard and injured on a covered situs may nonetheless *not* be covered by the LHWCA. That position is inconsistent with the position advocated by the United States in earlier Longshore jurisdiction cases before the Court, and in particular, the position advocated by the United States as *amicus* in *Chesapeake & Ohio Railway Company v. Schwalb*.[6]

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4 *Amicus* Brief for the United States, at p. 1.

5 ___ U.S. ___, 111 S.Ct. 807, at 819 (1991).

6 ___ U.S. ___, 110 S.Ct. 381 (1989).

In *Schwalb*, the United States argued persuasively in its *amicus* brief to the Court that:

> . . . Congress defined "employee" [in Section 2(3) of the LHWCA] to mean "any person engaged in maritime employment." The breadth of the statutory language suggests that courts should take an expansive view of the LHWCA's extended coverage, ... Moreover, the remedial purposes of the 1972 amendments . . . demand a liberal construction of the status requirement. The legislative history of the 1984 amendments to the LHWCA further confirms the propriety of reading the status provision broadly . . . .
>
> 2. The state court's standard [like the *Gizoni* Ninth Circuit's standard] also conflicts with the principles of coverage enunciated by this Court as followed by the lower federal courts and the Benefits Review Board. This Court has explicitly admonished that the Act's status provision should be interpreted broadly and in functional terms, so that the Act achieves its objective of providing uniform coverage for those engaged in longshoring [and Petitioner submits ship repair] and related jobs.[7]

Moreover, the United States would also have the Court ignore its prior arguments in *Schwalb* that:

> The expansion by the 1972 amendments [to the LHWCA] is particularly telling for purposes of

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[7] Brief for the United States as *Amicus Curiae* for the Petitioners, pp. 8, 9, in *Chesapeake & Ohio Railway Company v. Schwalb*, ___ U.S. ___, 110 S.Ct. 389 (Case Nos. 87-1979 and 88-127) (1989).

> this case because it targeted . . . tort liability remedies as well. Congress made the decision to expand its federal workers' compensation system after giving the "most careful consideration" to a report prepared by the National Commission on State Workmen's Compensation laws. [Citations omitted.] The report compared state compensation systems to those providing remedies through actions for negligence. It found that a modern workers' compensation system could provide broad coverage through liability without fault, substantial protection against interruption of income, and assured provision of medical services, while "[e]mployees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases." [Citation omitted.] Thus, the Commission endorsed as an ultimate objective "universal mandatory coverage" of workers under compensation systems. [Citation omitted.] And, in order to further that goal, the Commission recommended, *inter alia*, "that the term 'employee' be defined as broadly as possible." [Citation omitted.] Congress, in turn, noted that "the provisions in [the 1972 amendments] are fully consistent with the recommendations of the . . . [Commission.][8]

The United States is thus requesting the Court to take an approach in this case not only contrary to the approach advocated by the United States as *amicus* in *Schwalb*, but also contrary to the approach to Longshore jurisdiction mandated by the Court[9] in

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[8] *Id.*, at pp. 14, 15, ftn. 10.

[9] See Petitioner's Opening Brief, pp. 20-31.

Calbeck v. Travelers Insurance Co.,[10] *Northeast Marine Terminal Co., Inc. v. Caputo*,[11] *P.C. Pfeiffer Co., Inc. v. Ford*,[12] and *Director, OWCP v. Perini North River Associates*.[13]

Respondent and its *amici* would also have the Court ignore the fact that "Congress's purpose to minimize litigation must enter the calculus of the Act's interpretation.[14] That purpose will be

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[10] 370 U.S. 114 (1962).

[11] 432 U.S. 249 (1977).

[12] 444 U.S. 69 (1979).

[13] 459 U.S. 297 (1983).

[14] The citation by the UBCJA to the report of the Federal Courts Study Committee is misleading. *Amicus* Brief of UBCJA, at pp. 23 and 24. That committee was formed in order to address the crisis which was developing in the federal court system due to the increase in litigated cases and jury trials. The Committee specifically recommended that Congress repeal the Federal Employers' Liability Act and the Jones Act.

The Committee also emphasized that: "Workers' Compensation schemes for claims of this type deliver benefits in less time, that are less costly than court actions, save attorneys' fees and are no-fault, i.e., they do not require the claimant to prove negligence." *Report of the Federal Courts Study Committee*, April 2, 1990, at p. 62. The Committee indicated that eliminating FELA and Jones Act cases would reduce the civil courts' docket by 2%. However, the Committee by no means discounted the economy to be achieved by the elimination of FELA and Jones Act cases. To the contrary, FELA and Jones Act cases comprise 5% of all civil trials, and about 8% of all civil jury trials. *Id.*

most effectively served by a bright line definition that clearly protects all activity on the waterfront that is 'integral to overall longshore operations.'"[15] That purpose will also be most effectively served by a bright line definition that protects under the LHWCA all activity of shipyard employees on the waterfront that is integral to overall ship construction and ship repair activity.[16]

However, the position of Respondent and its *amici* would maximize litigation to the detriment of employees and employers alike, without any real increase in benefits to those employees. The arguments of Respondent and its *amici*, if accepted, would also undermine the uniform LHWCA compensation system available to land-based maritime employees injured on the waterfront, and result in uncertainty, delay and costs associated with a tort liability system, possible double recovery, and clearly increased judicial case load.

Further, Respondent and its *amici* simply ignore one of the most severe consequences of their position. If LHWCA employees such as shipbuilders and ship repairmen can claim seaman status,

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[15] Brief for the United States as *Amicus Curiae* for the Petitioners in *Schwalb, supra*, at p. 19, ftn. 17.

[16] The arguments of the United States that Petitioner's approach would draw an "irrational distinction between those in the enumerated categories . . . and other maritime employees" makes little sense. *Amicus* Brief of the United States, at p. 7. Congress drew that distinction when it enacted the 1972 Amendments and provided an "occupational test" in Section 2(3). The Court's approach to Longshore jurisdiction cases has emphasized that distinction. *See, e.g., Caputo, supra; Ford, supra.*

then maritime employers can similarly deny LHWCA benefits to those employees for the same reason. Maritime employers have no incentive to voluntarily provide compensation and medical services pursuant to the LHWCA to those employees who can claim Jones Act seamen status. Longshore claims by land-based maritime employees, who worked aboard floating platforms and the like, would simply be controverted pursuant to 33 U.S.C. § 914(d). And, given the over-expansive application of the Jones Act test to maritime employees under either the *Gizoni* Ninth Circuit approach or the *Robison*[17] approach untempered by *Pizzitolo*,[18] that may cover many employees indeed.

If the Court adopts the *Robison* test without the *Pizzitolo* correlative rule, the federal and state courts will simply be swamped with Jones Act claims by maritime employees who, prior to *Wilander*, clearly fell under the Longshore Act.[19] Further, virtually any maritime employee, including a traditional longshoreman, could be found to be a seaman under the *Robison* test. The only reasonable way to avoid "opening up the floodgates" to Jones Act claims is to adopt the *Pizzitolo* approach.

The arguments of Respondent and its *amici* thus ignore the congressional intent behind the LHWCA and its amendments. They also disregard the severe repercussions of accepting their arguments. On the other hand, a conclusion that employees in occupations specifically covered by the LHWCA are ineligible for a jury trial to determine their status as Jones Act seamen is consistent with the congressional intent behind the LHWCA, and should be adopted by the Court.

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17 *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

18 *Pizzitolo v. Electro-Coal Transfer Co.*, 812 F.2d 977 (5th Cir. 1977), *cert. denied*, 484 U.S. 1059 (1988).

19 See Footnote 27, *infra*.

II

THE APPROACH OF THE FIFTH CIRCUIT IN *PIZZITOLO* IS CONSISTENT WITH THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS, AND *WILANDER*, AND SHOULD BE ADOPTED BY THE COURT.

The decision of the Court in *McDermott International, Inc. v. Wilander*[20] rests in part on the enactment of the LHWCA in 1927 as a compensation scheme for longshore and harbor workers, to eliminate Jones Act benefits to land-based maritime and harbor workers, and to substitute a compensation remedy for those workers.[21] Indeed, the Court declared in *Wilander* that "[t]he LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' had been taken to include land-based employees."[22]

Moreover, the Court emphasized in *Wilander* that with the passage of the LHWCA,

> . . . Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.[23]

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20 ___ U.S. ___, 111 S.Ct. 807 (1991).

21 *Seaman Status: The Supreme Court Recharts Its Course, Wilander and Gizoni*, Eileen Madrid, 51 Louisiana Law Review, No. 6, at p. ___ (July 1991).

22 *Wilander*, 111 S.Ct. at 817.

23 *Wilander*, 111 S.Ct. at 813.

Therefore, "[w]hether under the Jones Act or general maritime law, seamen do not include land-based workers."[24]

Respondent and its *amici* have ignored the import of *Wilander*. They would have virtually every case involving longshoremen, harbor workers, ship repairmen, shipbuilders, and shipbreakers, all land-based maritime workers who owe their allegiance to land-based employers, proceed to a jury trial for a determination of their status as Jones Act seamen if they worked aboard floating platforms.[25] However, a jury is particularly ill-suited to evaluate the congressional intent behind the LHWCA and its amendments for a uniform, no-fault compensation system to provide prompt medical services and compensation to land-based maritime workers[26] injured on the waterfront.[27]

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[24] *Wilander*, 111 S.Ct. at 814.

[25] Further, the continued viability of *Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983), cited by the UBCJA in support, is doubtful in view of the Fifth Circuit's later decisions in *Pizzitolo, supra*, and *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991), and more importantly, *Wilander*. Respondent and its *amici* appear to refuse to accept that the LHWCA and Jones Act are mutually exclusive. Continued "percolation" will not alter that fact.

[26] Indeed, discussion of the benefits available under the workers' compensation system have been found by some courts to unduly prejudice Jones Act juries. *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (5th Cir. 1977).

[27] Many, if not most, of the pile drivers/harbor workers previously deemed covered by the LHWCA may now arguably be excluded from LHWCA coverage as Jones Act seamen based on *Wilander*. *See, e.g., McIntosh v.* (continued...)

On the other hand, the approach of the Fifth Circuit in *Pizzitolo v. Electro-Coal Transfer Company*,[28] and *Fontenot v. AWI, Inc.*,[29] presages the Court's analytical approach in *Wilander*, and would limit those Jones Act cases that went to the jury. In *Pizzitolo* and *Fontenot*, the Fifth Circuit held that if a plaintiff in a Jones Act suit is covered by the LHWCA, he is ineligible for consideration as a Jones Act seaman. *Pizzitolo* and *Fontenot*, like *Wilander*, thus focus on the statutory language and the congressional intent behind the Jones Act and the later enacted LHWCA. Further, nothing in *Wilander* signals a rejection of the Fifth Circuit's refinement of *Robison*[30] in *Pizzitolo*.

Indeed, *Pizzitolo* and *Fontenot* help to dispel the prior confusion over the interplay between the Jones Act and the later enacted LHWCA. The arguments of Respondent and its *amici*, if

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[27](...continued)
Parkhill Goodloe Co., 4 BRBS 3, *aff'd* 550 F.2d 1283 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978) (employee working on barge to clean debris from waterway not aboard to aid in navigation; not excluded from LHWCA as a member of a crew); *Craig v. American Dredging Co., 10 BRBS 1014 (1979), aff'd*, 620 F.2d 285 (2d Cir. 1980) (barge foreman not aboard primarily to aid in navigation not excluded from LHWCA as member of crew). As a result, many of the cases previously addressed by the LHWCA may now be litigated in court, with the consequent increase in caseload for the judiciary, unless the *Pizzitolo* approach is followed.

[28] 812 F.2d 977 (5th Cir. 1977), *cert. denied*, 484 U.S. 1059 (1988).

[29] 923 F.2d 1127 (5th Cir. 1991).

[30] *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

accepted, would resurrect that confusion and the associated mischief which the LHWCA was designed to dispel. In *Pizzitolo*, the Fifth Circuit persuasively reasoned that:

> The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding, and ship repairing, who were injured on navigable waters, were the intended beneficiaries of the 1927 [LHWCA]. The LHWCA as amended in 1972 expressly covered workmen engaged in these occupations . . . . Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the LHWCA as members of the crew of a vessel.[31]

Respondents and its *amici*, however, would prefer that each case proceed to a jury without consideration of the LHWCA. However, "indiscriminate application of [the] seaman status test by jurors to workers who are engaged in those specific occupations enumerated in [Section 2(3)] of the LHWCA generates an over-expansive class of Jones Act seamen, which includes many land-based ship repairmen, traditional longshoremen, and harbor workers whose only work on vessels is in port."[32] Nevertheless, the approach of the Fifth Circuit in *Pizzitolo* and *Fontenot*, applied as a threshold status issue, can provide the appropriate statutory standard sufficient to support dismissal or summary judgment under Federal Rules of Civil Procedure Rule 56 or its state

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[31] 812 F.2d 977, at 983.

[32] *Seaman Status: The Supreme Court Recharts Its Course, Wilander and Gizoni*, Eileen Madrid, 51 Louisiana Law Review, No. 6, at ____ (July 1991).

counterpart in cases involving workers engaged in occupations enumerated in Section 2(3) of the LHWCA.[33]

Respondent's reliance on *Herb's Welding, Inc. v. Gray*,[34] for the proposition that employees in occupations covered by the LHWCA are nonetheless entitled to pursue Jones Act claims against their employers is misguided. There was simply no claim for seaman status involved in that case. In *Gray*, the Court held that an oilfield worker, a welder, was not a maritime employee covered by the LHWCA. Moreover, the Court's footnote in *Gray* that workers not covered by the LHWCA may be able to pursue Jones Act claims if permanently attached to a vessel as seamen does not lend any support to Respondent's claim.[35] Gizoni is a ship repairman employed by a statutory employer on a covered situs and is thus covered by the LHWCA.

Respondent correctly points out that a basis for the District Court's entry of summary judgment was a finding that Gizoni was a ship repairman covered by the Longshore Act, rather than a seaman covered by the Jones Act. That decision was based in part upon a finding that the occupation in which Gizoni worked and the duties which Gizoni performed were covered by the LHWCA.

Respondent's statement of facts in his opposition amounts to a third recharacterization of the evidence presented to the District Court. However, Respondent has not disputed the basic premise that he was a rigging foreman employed to repair ships on behalf of Petitioner Southwest Marine. Indeed, Respondent stipulated that he is a ship repairman.[36] Nevertheless, almost any employee could claim that questions of fact exist, thereby ensuring that the case proceeded to a jury trial. That approach would disrupt the uniform Longshore compensation system.

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[33] *Id.*

[34] 470 U.S. 414 (1985).

[35] 470 U.S. at 417, fn. 2.

[36] Respondent's Brief, at p. 20.

Like many riggers, Gizoni was called upon to walk across the vessels he repaired, and he also walked across and worked aboard certain floating platforms which Respondent characterized as barges for the purpose of opposing the summary judgment motion. Nevertheless, Petitioner has not denied that floating platforms or barges are occasionally used in the removal of rudders, shafts and propellers, and are occasionally used to position workmen alongside the vessels being repaired.

As a rigger, Gizoni was responsible for the movement of materials and equipment on and off of vessels. Respondent contends that certain barges were "assigned" to the Rigging Department and riggers worked aboard them on a daily basis.[37] However, that allegation cannot alter the nature of the work of riggers and ship repairmen. Riggers work in most shipyards in the United States and that shipyard work requires that materials and equipment be moved via floating platform.

If, as Respondent contends, the District Court was incorrect in finding that Gizoni was covered by the Longshore Act, then virtually every ship repairman would be excluded from Longshore coverage. The Longshore Act from its inception has applied to work aboard vessels and necessarily involves floating platforms and equipment. The allegation of "assignment" to a vessel and contribution to its mission could be made by almost any employee or employer concerning most longshore or harbor work. Further, Respondent's references to tug boats, inter-harbor transportation of parts or equipment, river barges and the "NASSCO crane accident" have nothing to do with this case.

Any legal standard is always subject to more difficult test cases. Respondent's claim that tugboat operators and crew members would be excluded by Petitioner's approach and would be difficult to reconcile with decisions of the court and the lower courts is superfluous. Tug captains, boat operators or crew

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[37] Respondent's Brief, at pp. 2, 3, 11, and 12.

members of tugs have not posed difficult test cases under the Longshore Act-Jones Act interplay. To the contrary, the lack of reported cases suggests that employees and employers have seldom found it necessary to litigate the status of such employees. Instead, it is the construction workers, longshoremen, riggers, shipbuilders and ship repairmen which form the crux of the dispute over seaman status. And, the *Pizzitolo* approach by the Fifth Circuit would remedy that problem.

III

THE POSITION OF RESPONDENT AND ITS *AMICI* RESURRECTS THE MISCHIEF WHICH THE LHWCA WAS DESIGNED TO AVOID.

Respondent has agreed and stipulated that he is a "ship repairman."[38] However, Respondent argues that because the term "ship repairman" is subject to certain exclusions set forth in Section 2(3) of the LHWCA, the term "ship repairman" adds nothing to the definition. Respondent's argument is circular, and has been rejected by the Court.[39] If one accepts that the definition of employees covered by the LHWCA is subject to the exclusion found within Section 2(3)(g), then *any* employee who claims an exclusion under that section would be entitled to proceed to a jury trial. However, the Court has determined that the term "seaman" as used by Congress in the Jones Act is limited by the Longshore Act.[40] If one accepts Respondent's argument, that limitation would be meaningless, and would maximize litigation in the Longshore and civil forums.

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[38] Respondent's Brief, at p. 20.

[39] *Wilander*, 111 S.Ct. at 817.

[40] *Id.*

Respondent and its *amici* would appear to prefer that a vague standard be used by juries in determining seaman status. To that end, they argue that no further clarification of the test for seamen status is necessary. The trial lawyers may prefer that there be no further clarification of the seaman status test, since an ambiguous seaman status test would result in increased litigation. However, the Court has acknowledged that the law in this area is a morass.[41] Therefore, the Court should read the Jones and Longshore Acts in light of the mischief to be corrected, which does require clarification from the Court.

Respondent also argues that the term "land-based maritime worker" adds vagueness to the law. In effect, Respondent suggests that that standard is "misleading" and "obviously incorrect" as applied to certain crewmen. Respondent obviously disagrees with the land-based versus sea-based standard determined by the Court in *Wilander*. Indeed, Respondent and its *amici* appear to characterize every manner of construction worker and harbor worker as susceptible to satisfying the *Robison*[42] seamen status test. That is, such workers may perform substantial work aboard a vessel and aid in the mission or work of that vessel. Therefore, almost all such employees would be excluded from Longshore coverage. However, that is, as shown earlier, contrary to the congressional intent behind the LHWCA.

Respondent's rhetorical question, "what does Southwest Marine really want out of this case?" is obviously meant to suggest that Petitioner seeks to distort an existing, unambiguous maritime law which has developed surrounding the Longshore and Jones Acts. However, the law that has developed is a "morass." That law unnecessarily burdens employers and employees alike. Furthermore, Respondent's fabrication of hypothetical and difficult to analyze cases under proposed or existing law should not divert

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[41] *Wilander*, 111 S.Ct. at 814, 816.

[42] 266 F.2d 769 (5th Cir. 1959).

the Court from addressing the problem at hand. This case involves a ship repairman employed by a shipyard on a covered situs.

Respondent does not dispute that Congress left it to the courts to fashion a test for seaman status. However, many courts, not familiar with the characteristics of maritime employment and maritime ventures, have struggled with the issue and consequently have chosen to abdicate issuing decisions in favor of allowing a jury trial. That situation has not assisted maritime employees or employers. Instead, the lack of workable standards has compounded the problems surrounding the Jones and Longshore Acts and the uncertainty for employers and employees alike.

The Court has recently accepted the guidance of the Fifth Circuit with respect to clarifying the basic standard applicable to seamen status.[43] The Court should also adopt the Fifth Circuit's approach regarding the interaction between the Longshore and Jones Acts and the appropriate means for resolving cases which are arguably covered by the two Acts.[44]

Respondent also claims that Congress did not grant immunity to shipyards from Jones Act claims.[45] Yet the Court and virtually every lower court have agreed that the Longshore and Jones Acts are mutually exclusive. Respondent thus claims an abstract exclusivity which in reality fails to provide any exclusivity. *Amicus* UBCJA also argues openly that in order to properly compensate maritime workers, those workers require

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[43] *See Wilander, supra,* affirming the seaman status test enunciated in *Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959).

[44] *See Pizzitolo v. Electro-Coal Transfer Co.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988); and *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (1991).

[45] Respondent's Brief, at p. 22.

access to both seaman and Longshore benefits.[46] However, that argument should be made to Congress.

Respondent's loose use of authority is also demonstrated by his discussion of the dual capacity doctrine, which is surrounded by confusion, and uncertainty. Certainly, *Edmonds v. Compaignie General TransAtlantique*[47] does not support the proposition for which it is cited, that prior to the 1984 Amendments *all* employees covered by the Longshore Act could file third party negligence actions against their employers if their employers were vessel owners and were negligent in their capacity as vessel owner.[48] Indeed, *Napoli v. Atlantic Lines Ltd.*[49] and *Allied Towing Corp. v. Tatans*,[50] both pre-*Edmonds* cases, were not only overruled by the 1984 Longshore Amendments, but were also overruled or modified by *Edmonds*. Furthermore, Respondent's citation to those cases adds nothing to Respondent's argument, other than to demonstrate that after the lower courts had acted to weaken shipyard immunity, Congress strengthened those immunities for shipyards with the 1984 Longshore Amendments.

Nevertheless, Respondent and its *amici* appear to acknowledge the problems with the existing system. *Amici* refers to many maritime workers as "an endangered species"[51] and admit that congested courts lead employees to seek remedies to which they are not entitled.[52] Indeed, *Amici* urge that

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[46] *Amicus* Brief of UBCJA, at pp. 19-21.

[47] 443 U.S. 256 (1979).

[48] Respondent's Brief, at p. 16.

[49] 536 F.2d 505 (2d Cir. 1976).

[50] 580 F.2d 702 (4th Cir. 1978).

[51] *Amicus* Brief of UBCJA, at p. 7

[52] *Amicus* Brief of UBCJA, at p. 17.

unreasonably low maintenance rates cause seamen working in a "zone of uncertainty" to seek a Longshore remedy, which was never intended to benefit them.[53] Yet, *Amici* make no suggestions for resolving that "zone of uncertainty."

Moreover, use of "interim" inconsistent remedies, rather than "subsisting on maintenance and cure" is a cynical suggestion. However, counsel for the UBCJA goes further. He also alludes to the creation of ostensibly mutually exclusive statutory systems, where only a "final adjudication" in one forum would bar liability in the other. That is, employers would be forced to controvert benefits under the LHWCA, forcing not only the filing of concurrent inconsistent claims, but also a final adjudication in whichever forum the employee files first.

The *Pizzitolo* approach urged by Petitioner on the other hand allows questionable cases to be first referred to the swift administrative system provided by the LHWCA. Clear cases such as the case herein could be summarily dealt with in the courts. A mere credit for the liability in one forum against any liability imposed in the other forum is simply insufficient. The cost of insuring against both Longshore and Jones Act exposures is prohibitive, and duplicative legal costs are likely. Indeed, a primary purpose of the LHWCA was to decrease the litigation costs to employers in return for providing prompt and predictable compensation benefits to maritime employees.[54] Respondent and its *amici* thus cannot seriously suggest that credit rights are the solution.

Petitioner urges the Court to follow the lead of the Fifth Circuit and adopt the *Pizzitolo* approach in the same fashion that the Court followed the lead of the Fifth Circuit in *Wilander* and

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[53] *Amicus* Brief of UBCJA, at p. 20.

[54] *See Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, at 636 (1983).

adopted the *Robison* test. The *Pizzitolo* approach is merely a refinement of *Robison* and should be adopted by the Court.[55]

CONCLUSION

The Ninth Circuit *Gizoni* decision resurrects the mischief which the LHWCA and its amendments were designed to dispel. On the other hand, the Fifth Circuit *Pizzitolo* approach is consistent with the congressional intent behind the LHWCA and its amendments, is in accord with *Wilander*, and serves the ends to be attained by the LHWCA. Therefore, Petitioner urges the Court to determine that employees in occupations specifically covered by the Longshore Act are ineligible to proceed to a jury trial to determine their status as Jones Act seamen. The Ninth Circuit decision should be reversed.

Respectfully submitted,

LITTLER, MENDELSON,
FASTIFF & TICHY
A Professional Corporation
GEORGE J. TICHY, II, ESQ.
ROY D. AXELROD, ESQ.
JAMES J. McMULLEN, JR., ESQ.
(COUNSEL OF RECORD)
JACQUELINE P. McMANUS, ESQ.

By: _____
ROY D. AXELROD

Attorneys for
Southwest Marine, Inc.

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[55] *See Seaman's Status Reconstructed*, Kenneth G. Engerrand, 32 S.Tex. L.R. 169, at 181, n. 91 (1991).